

ESTTA Tracking number: **ESTTA275094**

Filing date: **03/30/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184213
Party	Plaintiff Galaxy Metal Gear, Inc.
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Signature	/Kenneth Tanji, Jr./
Date	03/30/2009
Attachments	opp msj.pdf (40 pages)(1332638 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No.: 78914975

Filed: 6/22/2006

Mark: METAL GEAR

GALAXY METAL GEAR, INC.,

Opposer,

vs.

DIRECT ACCESS TECHNOLOGY, INC.

Applicant.

Opposition No.: 91184213

Action filed: May 20, 2008

OPPOSER'S OPPOSITION TO
APPLICANT'S MOTION FOR SUMMARY
JUDGMENT; REQUEST FOR LEAVE TO
FILE SUPPLEMENTAL BRIEF IF
MOTION FOR REQUEST FOR
DISCOVERY GRANTED

OPPOSER'S OPPOSITION TO APPLICANT'S

MOTION FOR SUMMARY JUDGMENT

Opposer Galaxy Metal Gear, Inc., submits this opposition to the Motion for Summary Judgment of Applicant Direct Access Technology, Inc., as follows.

This opposition is made on the grounds there are genuine issues of material fact to be tried as follows: (1) whether Applicant committed fraud with respect to the ownership of the mark "Metal Gear" and (2) whether "Metal Gear" is descriptive of computer hard drive enclosures.

As set forth below, Opposer contends there is a genuine factual dispute on these issues as follows:

FRAUD IN APPLICATION RE: OWNERSHIP OF MARK: There is insufficient evidence to establish Applicant, a United States distributor of enclosures manufactured

by a foreign company, has ownership of “Metal Gear.” Specifically, there is evidence from former sales representatives of Applicant’s manufacturer, Datastor, that Datastor sold “Metal Gear” enclosures to Opposer and CompUSA as well as Applicant on behalf of Datastor, thereby indicating Applicant is not the owner of the “Metal Gear” mark. In addition, there is no evidence of any assignment of trademark rights from Datastor to Applicant. Accordingly, the lack of evidence that Applicant is the owner of “Metal Gear” indicates there is a genuine factual dispute as to Applicant’s good faith in its representation that it owns “Metal Gear.”

“METAL GEAR” IS DESCRIPTIVE: “Metal Gear” is descriptive of metal computer hard drive enclosures as shown by other registrations and publications, including dictionary definitions, thus indicating there is a genuine factual dispute on this issue.

STANDARDS FOR RULING ON MOTION FOR SUMMARY JUDGMENT

In deciding a motion for summary judgment, the Board is not to try issues of fact, but to determine if there are any genuine issues of material fact to be tried. The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist; and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the non-moving party. TBMP 528.01.

The evidence that may be submitted in opposition to a motion for summary judgment includes depositions, copies of other registrations, documents or things

produced in response to a request for production, and testimony from other proceedings.

TBMP 528.05(a).

THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER
APPLICANT COMMITTED FRAUD

Opposer contends Applicant committed fraud in this application because Opposer contends Applicant knowingly made the false contention that Applicant owns the mark “Metal Gear.”

This is because Applicant never owned the mark “Metal Gear.” Applicant is merely one of two United States distributors for the true owner of “Metal Gear,” the manufacturer: Datastor Technology Company, Ltd. (“Datastor”). The other United States distributor is Opposer. Applicant claims Datastor considered Applicant to be the exclusive distributor of Datastor’s “Metal Gear” enclosures in the United States. Opposer disputes that because Opposer also distributed Datastor’s “Metal Gear” enclosures. In fact, Opposer also claims Datastor considered Applicant to be the exclusive distributor of Datastor’s “Metal Gear” enclosures in the United States (deposition of Tony Tan, page 44, line 15, to page 45, line 6, Exhibit B)!

Even if Applicant was the exclusive United States distributor, that would not mean it owned “Metal Gear.” “A distributor does not acquire ownership of a foreign manufacturer’s mark ... merely through the sale and distribution of goods bearing the manufacturer’s trademark.” In fact, “trademark law creates a presumption that, in the absence of an assignment of trademark rights, a foreign manufacturer retains all rights to a trademark even after licensing the use of the trademark to an exclusive distributor.”

TMT North America, Inc. v. Magic Touch GmbH, 124 F.3d 876, 882, 43 USPQ2d 1912 (7th Cir. 1997).

If Applicant claims it owns “Metal Gear” instead of Datastor, the ownership is largely determined by the parties’ agreement. *Premier Dental Products Co. v. Darby Dental Supply Co., Inc.*, 794 F.2d 850, 854, 230 USPQ 233 (3rd Cir. 1986).

Based on the evidence submitted by Applicant, it is clear that Datastor owns “Metal Gear” and Applicant, at best, was one of two United States distributors of “Metal Gear” enclosures, even though Applicant was purportedly told by one Datastor sales representative that Applicant was exclusive in the United States.

First, Applicant did not produce, and therefore we can presume, that there is no express agreement for Applicant to own “Metal Gear.”

Second, Datastor’s actions clearly indicate Datastor thought it owned the “Metal Gear” mark. Datastor sold “Metal Gear” enclosures to Opposer (Tony Tan deposition page 38, line 20 to page 39, line 17, Exhibit B; Momo Chen deposition page 19, line 10, to page 26, line 20, Exhibit A)! The Gary Chen declaration submitted by Applicant states Datastor also sold “Metal Gear” enclosures not only to Applicant, but also to Worldwide Marketing (¶¶3-4 of Gary Chen declaration). Interestingly, Gary Chen does not say Datastor restricted Worldwide Marketing from selling “Metal Gear” enclosures to CompUSA, even though Gary Chen knows Worldwide Marketing sells product to CompUSA. However, Gary Chen’s successor at Datastor, Momo Chen, also sold “Metal Gear” enclosures to Worldwide Marketing, and she clearly understood those enclosures were going to CompUSA in the United States (deposition of Momo Chen page 47, line

11, to page 48, line 24, Exhibit A). Datastor also sold “Metal Gear” enclosures to Applicant.

The bottom line is that Applicant has not met its burden to show it is the owner of “Metal Gear.” The Gary Chen declaration submitted by Applicant contradicts Patrick Wang’s declaration that Applicant created and owned “Metal Gear.” It is evident Applicant is not the owner of “Metal Gear” and at best was a distributor who was erroneously told Applicant had exclusivity in the United States. Therefore, as Applicant claims it had so much knowledge as to the creation and ownership of “Metal Gear,” it calls into question the veracity of Applicant’s statements to the Board that Applicant is the owner of “Metal Gear.” Accordingly, Opposer submits there is a genuine issue of material fact as to Applicant’s fraud in its representation in the ownership of “Metal Gear.”

THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER
“METAL GEAR” IS MERELY DESCRIPTIVE

A mark can be refused registration as being merely descriptive of the goods to which it relates. 15 USC §1052(e)(1). There is no formula for deciding whether a trademark is merely descriptive, each case must be decided on its own merits. *In re Ampco Foods, Inc.*, 227 USPQ 331 (TTAB 1985).

In this case, “Metal Gear” refers to a hard drive enclosure that is made out of metal, and have primarily been metal since 2003 (Tony Tan deposition page 44, line 15, to page 45, line 6, Exhibit B). The enclosure is a container for a hard drive. “Metal” has already been disclaimed on this mark. Looking at other registrations, “metal” has been

disclaimed for “Metal Shop” (metal hardware and fasteners); and “Metal Gear” (flashlights) (Exhibit D).

The Merriam-Webster dictionary definition of “gear” is most commonly “goods” or “equipment.” (Exhibit C). Looking at other registrations, “gear” has been disclaimed in other registrations such as “Health Gear” (for medical professional and patient clothing); “Mommy Gear” (for a retail store); “Night Gear” (binoculars and vision scopes); “Clever Gear” (mail order catalog services); and “Road Gear” (vehicle play things) (Exhibit D).

Opposer notes that Applicant asserted that Tony Tan will testify on the issue of descriptiveness. That is incorrect. Tony Tan is not intended to be a witness on the issue of descriptiveness. That is consistent with Opposer’s initial disclosures. Tony Tan is not competent to testify as to the descriptiveness issue, and that is why questions about this were objected to as noted in the attached Evidentiary Objection.

The bottom line is that “Metal Gear” describes a good or piece of equipment that is metal. Metal is an ingredient or character of the “Metal Gear” enclosure. A hard drive enclosure is a piece of equipment. “Metal Gear” perfectly describes qualities, characteristics, attributes, and ingredients of the “Metal Gear” hard drive enclosure. This meets the test of determining whether a mark is merely descriptive. This is supported by the disclaimers in the above-noted other registrations, which if not determinative of whether “Metal Gear” is merely descriptive at least indicates “Metal Gear” is merely descriptive. Accordingly, Opposer submits there is a genuine issue of material fact on the issue of whether “Metal Gear” is merely descriptive.

OPPOSER REQUESTS LEAVE TO FILE SUPPLEMENTAL BRIEF

IF MOTION FOR REQUEST FOR DISCOVERY IS GRANTED

This Opposition takes into account Gary Chen's declaration. Opposer submits it needs to take the deposition of Gary Chen to properly oppose this Motion for Summary Judgment, and that is explained further in Opposer's Motion for Request for Discovery. Pending the outcome of that Motion for Discovery, Opposer submits this Opposition. However, if Opposer's Motion for Request for Discovery is granted, Opposer respectfully requests leave to file a supplemental brief.

Dated: March 30, 2009

Respectfully submitted,

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No.: 78914975

Filed: 6/22/2006

Mark: METAL GEAR

GALAXY METAL GEAR, INC.,

Opposer,

vs.

DIRECT ACCESS TECHNOLOGY, INC.

Applicant.

Opposition No.: 91184213

Action filed: May 20, 2008

DECLARATION OF KENNETH TANJI, JR.
RE: OPPOSER'S OPPOSITION TO
APPLICANT'S MOTION FOR SUMMARY
JUDGMENT

DECLARATION OF KENNETH TANJI, JR.

I, Kenneth Tanji, Jr. , declare as follows:

1. I am an attorney duly licensed to practice law in the State of California. I am co-counsel for Opposer, Galaxy Metal Gear, Inc., in this matter. I have personal knowledge of the matters set forth in this declaration and, if called as a witness, would truthfully and competently testify as to the following.

2. A copy of excerpts of the discovery deposition of Momo Chen in this proceeding is attached hereto as Exhibit A.

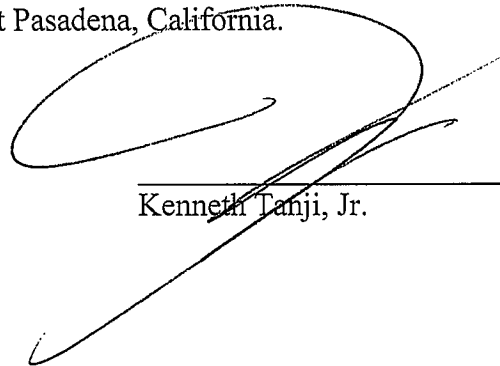
3. A copy of excerpts of the discovery deposition of Antonio Tan in this proceeding is attached hereto as Exhibit B.

4. A copy of printouts I made from the Merriam Webster website for the definitions of metal, gear, and equipment is attached hereto as Exhibit C.

5. A copy of printouts I made from the USPTO website is attached hereto as Exhibit D.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 30, 2009, at Pasadena, California.



Kenneth Tanji, Jr.

EXHIBIT A

DEPOSITION OF MOMO CHEN

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GALAXY METAL GEAR, INC.,)	
)	
Opposer,)	
)	
vs.)	No. 91184213
)	
DIRECT ACCESS TECHNOLOGY, INC.,)	
)	
Applicant.)	

DEPOSITION OF MOMO CHEN
Thursday, November 13, 2008
Pasadena, California

REPORTED BY: Jamie B. Snyder, CSR No. 5159

1 understanding as to where the enclosures were
2 manufactured?

3 A. The manufactured products for Data Store were
4 made in Mainland China.

5 Q. Do you have an understanding as to whether the
6 enclosures were manufactured because of an order by Data
7 Store?

8 A. Data Store would design and manufacture the
9 products themselves.

10 Q. For the external enclosures that you were
11 selling for Data Store, was there a particular brand
12 name for them?

13 A. Yes.

14 Q. What was that?

15 A. Metal Gear, not just that one, and many
16 others.

17 Q. What others?

18 A. Galaxy.

19 Q. What else?

20 A. And some are for other customers.

21 Q. What do you mean by that?

22 A. External enclosure is one kind of product, it
23 could be put with many names, and we would do it
24 according to our clients' request, whatever names they
25 like, we would put the name.

1 Q. Now, you mentioned this name of Metal Gear, so
2 is that a name that a client wanted?

3 A. That was a name that Data Store originally had
4 it, and the customer liked it, so used it.

5 MR. OLSON: Well, I'll object for speculation.

6 MR. GURITZKY: Join.

7 BY MR. TANJI:

8 Q. How do you know that Data Store had the name?

9 A. They had their existing products for this
10 name, and those were sold to many other customers.

11 MR. OLSON: I'll object as hearsay.

12 MR. GURITZKY: Join.

13 BY MR. TANJI:

14 Q. What customers were those?

15 A. We sold it to DAT, Galaxy, CompUSA.

16 Q. Any others that you know about?

17 A. Others --

18 THE INTERPRETER: Counsel, may I clarify?

19 (The interpreter and the witness speak in
20 Mandarin.)

21 THE WITNESS: Others, if not handled by
22 myself, I wouldn't know.

23 BY MR. TANJI:

24 Q. So are you saying that for DAT, Galaxy and
25 CompUSA, you worked on those accounts?

1 A. Yes.

2 Q. And when you said something about the customer
3 liking it, what did you mean?

4 A. If customers liked our products, they would
5 order -- they would purchase our products, and they will
6 order again.

7 Q. But I was talking specifically about the
8 Metal Gear enclosure, so you're saying something that
9 the customers liked that name?

10 MR. OLSON: I'll object; it's leading.

11 MR. GURITZKY: Join.

12 THE WITNESS: Data Store would design their
13 own products with their specific features, including the
14 name, and we would show this to our customers. If the
15 customers liked the design, then they would take it.

16 BY MR. TANJI:

17 Q. But by name, do you mean the Metal Gear name?

18 MR. OLSON: I'll object; it's leading and
19 speculative.

20 THE WITNESS: Correct.

21 MR. GURITZKY: Join.

22 BY MR. TANJI:

23 Q. Well, wait. Which name are you talking about?

24 A. The three companies that I just mentioned, I
25 am referring to Metal Gear.

1 MR. OLSON: I'll object; speculation, it calls
2 for -- also hearsay.

3 MR. TANJI: All right. Well, let's talk about
4 CompUSA.

5 Q. So tell me how CompUSA came to order products
6 from Data Store.

7 MR. GURITZKY: That calls for a narrative.

8 MR. OLSON: I'll join.

9 THE WITNESS: May I answer?

10 MR. TANJI: Yes.

11 THE WITNESS: Those companies, CompUSA, DAT
12 and Galaxy, those I took over the business, the accounts
13 from a previous sales. When I started in Data Store,
14 soon after, that person left, so I took over the work
15 for CompUSA, including delivery of products, and, also,
16 same thing for DAT and Galaxy.

17 BY MR. TANJI:

18 Q. Who is the person you took over the CompUSA
19 account from?

20 A. I think the interpreter is not translating the
21 same as what you said.

22 Q. The last question or your answer?

23 A. Are you asking the counter window of CompUSA?

24 Q. Ma'am, my last question was you said you took
25 over the CompUSA account from somebody else. Who was

1 that person?

2 A. That's the person, the salesperson before me.

3 Q. Yeah. Do you remember that person's name?

4 A. Yes.

5 Q. Who was that?

6 A. Gary.

7 Q. Last name?

8 A. I don't remember.

9 Q. Was that the Gary who now works at Galaxy?

10 A. Of course not.

11 Q. What products was Data Store selling at
12 CompUSA when you worked on that account?

13 A. Same thing, external enclosures.

14 Q. Did the enclosures have a name?

15 A. Yes.

16 Q. What was that?

17 A. Metal Gear.

18 Q. Was the words "Metal Gear" on the enclosures
19 that were sold by Data Store to CompUSA?

20 A. Yes.

21 Q. As far as you know, did Data Store need any
22 license to sell an enclosure to CompUSA with Metal Gear
23 written on it?

24 MR. OLSON: Calls for speculation.

25 MR. GURITZKY: Join. Lacks foundation.

1 MR. OLSON: And, also, object it calls for a
2 legal conclusion.

3 MR. GURITZKY: Join.

4 THE WITNESS: Can you repeat the question?

5 MR. TANJI: I'll have the court reporter read
6 it.

7 (The record was read by the reporter as
8 follows:

9 "Q. As far as you know, did Data Store
10 need any license to sell an enclosure to
11 CompUSA with Metal Gear written on it?"

12 MR. GURITZKY: Same objections.

13 THE WITNESS: No.

14 BY MR. TANJI:

15 Q. As far as you know, did Data Store have any
16 licensing agreement with anyone regarding the sale of
17 the enclosures of Metal Gear that was sold by Data Store
18 to CompUSA?

19 A. No. As a salesperson, the more products we
20 could sell, the better, as far as I understand.

21 MR. TANJI: All right. I'll have the court
22 reporter repeat that question.

23 (The record was read by the reporter as
24 follows:

25 "Q. As far as you know, did Data Store

1 have any licensing agreement with anyone
2 regarding the sale of the enclosures of Metal
3 Gear that was sold by Data Store to CompUSA?"

4 THE WITNESS: As far as I know, no.

5 BY MR. TANJI:

6 Q. As far as you know, for the enclosures with
7 Metal Gear that Data Store sold to CompUSA, did Data
8 Store have to share any of the revenues or profits with
9 anyone?

10 MR. OLSON: I'm going to object; speculation.

11 MR. GURITZKY: Join.

12 THE WITNESS: No. No, because we're only
13 making the sales.

14 BY MR. TANJI:

15 Q. How many units of enclosures with Metal Gear
16 did Data Store sell to CompUSA while you worked at Data
17 Store?

18 A. I cannot remember the exact figure, but about
19 over 1,000.

20 Q. Do you remember who you dealt with at CompUSA?

21 THE INTERPRETER: Counsel, would you --

22 BY MR. TANJI:

23 Q. Do you remember which person at CompUSA you
24 had contact with?

25 A. I don't quite remember.

1 Q. Regarding Galaxy Metal Gear, how many
2 enclosures with Metal Gear did Data Store sell to them
3 while you worked at Data Store?

4 A. I left quite some time ago, so I don't quite
5 remember. About, I think, over 5K.

6 Q. Who did you have contact with at Galaxy while
7 you worked at Data Store?

8 A. Tony and Gary.

9 Q. When Galaxy was buying enclosures from Data
10 Store with Metal Gear on it, was that a situation in
11 which they liked the name or is that a name that they
12 came up with?

13 A. They purchased the products from Data Store.
14 We had this name, and they liked the name.

15 Q. When you worked at Data Store, how many
16 enclosures of Metal Gear did Data Store sell to
17 Direct Access Technology?

18 A. As far as I know, same thing, it's quite some
19 time ago. I remember they had quite some volume. About
20 or at least 10K.

21 MR. GURITZKY: Could I have that question read
22 back, please?

23 (Question read.)

24 MR. GURITZKY: Thank you.

25 BY MR. TANJI:

1 Q. Had you ever talked with Mr. Wang before
2 2000 -- March 2004?

3 A. No.

4 Q. Now, you said that you sold some Metal Gear
5 enclosures to -- to Data Store, Galaxy Metal Gear and
6 DAT, correct?

7 MR. TANJI: Objection; it's misstating your
8 testimony. I think you said she sold to Data Store.

9 MR. OLSON: I thought I made that mistake, but
10 I'm glad you corrected me.

11 Q. While you were employed at Data Store, you
12 sold Metal Gear enclosures to CompUSA, Direct Access
13 Technology and Galaxy Metal Gear, correct?

14 A. Correct.

15 Q. Okay. Now, the buyer for CompUSA was Alex,
16 right?

17 A. I don't quite remember.

18 Q. Did you sell directly to CompUSA or did you
19 sell to Worldwide Marketing?

20 A. At that time, to Worldwide Marketing.

21 Q. And Worldwide Marketing is located in
22 Hong Kong and Taiwan, correct?

23 A. At that time, yes, but now maybe they have
24 changes.

25 Q. You don't know if they changed or not, right?

1 A. I don't know any details.

2 Q. Okay. Is it your understanding that Worldwide
3 Marketing sold the Metal Gear enclosures to CompUSA?

4 A. No, it's not like that. As far as I know, it
5 is not Worldwide Marketing selling to CompUSA, Worldwide
6 Marketing is a branch office of CompUSA in Taiwan, so
7 selling to Worldwide Marketing is the same as selling to
8 CompUSA, so we're selling directly to CompUSA through an
9 office in Taiwan.

10 Q. Were the invoices issued to Worldwide
11 Marketing?

12 A. I don't quite remember (in English).

13 THE INTERPRETER: "I don't quite remember."

14 BY MR. OLSON:

15 Q. You've never been employed by Worldwide
16 Marketing, have you?

17 A. No.

18 Q. Have you ever been employed by CompUSA?

19 A. No.

20 Q. Would it be fair to say the only thing you
21 know about the relationship between CompUSA and
22 Worldwide Marketing is what other people have told you?

23 A. No, I was told by the person I dealt with in
24 Worldwide company -- Worldwide Marketing.

25 Q. Right. You don't have any personal knowledge

EXHIBIT B

DEPOSITION OF ANTONIO TAN

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 78914975
For the mark, METAL GEAR

ORIGINAL

Galaxy Metal Gear, Inc.,)

Opposer,)

vs.)

Direct Access Technology, Inc.,)

Applicant.)

Opposition No. 91184213

DEPOSITION OF: ANTONIO TAN

Person Most Knowledgeable - Galaxy Metal Gear, Inc.

Newport Beach, California

February 13, 2009

Reported by: Kimberlee Castro, CSR No. 11459
Certified Shorthand Reporter

1 A No.

2 Q Have you ever talked with -- well, strike that.

3 Were you present at any conversations between Gary
4 Chen's supervisors and DAT regarding exclusivity in the
5 U.S. market?

6 A No.

7 Q The e-mail appears to have been sent July 9th,
8 2004, at 11:51 a.m. Do you see that?

9 A I see that.

10 Q Would it be fair to say that in July 2004 Galaxy
11 Metal Gear was not buying enclosures from datastor?

12 A No.

13 Q That's true, correct?

14 A That's true.

15 Q Did anyone at datastor promise you exclusivity in
16 the U.S. market?

17 MR. LEE: You meaning Galaxy?

18 MR. OLSON: Let me rephrase the question.

19 BY MR. OLSON:

20 Q Do you recall, has anyone at datastor promised
21 exclusivity to Galaxy in the U.S. market?

22 A Yes.

23 Q And what did they promise -- strike that.

24 Was the promise made to you personally or someone
25 else.

1 A To us all three of us.

2 Q You were personally present when someone at
3 datastor said you have exclusivity?

4 A Yes.

5 Q And who said that?

6 A I believe it was Momo Chen under Anderson Chen's
7 approval.

8 Q Did Anderson actually promise you exclusivity, or
9 did Momo tell you Anderson said you had exclusivity?

10 A As I recall, they told -- it was Anderson's
11 approval that we're going to get exclusivity on the Galaxy
12 Metal Gear.

13 Q Okay. The enclosures?

14 A Enclosures.

15 Q And when was that?

16 A It should be around, based on my knowledge, maybe
17 around 2005.

18 Q So around the time you first agreed to buy Galaxy
19 Metal Gear from -- well, strike that.

20 Around the time Galaxy Metal Gear first started
21 buying product from datastor, Galaxy Metal Gear was
22 promised exclusivity by Momo Chen?

23 A Yes.

24 Q Did you believe that promise of exclusivity?

25 A Yes.

1 Q Were they manufacturing enclosures or buying from
2 somebody else?

3 A Buying from somebody else.

4 Q And what year do you recall them first selling an
5 enclosure?

6 A Based on my knowledge, maybe 2003, 2002.

7 Q Okay. And what kind of enclosure were they
8 selling when they first got into it?

9 A 3.5.

10 Q Did the 3.5" enclosure come out first and then
11 later 5.25?

12 A Correct.

13 Q Do you recall when the first 5.25" first came out?

14 A I don't know.

15 Q The first enclosures that came out had plastic
16 casing, correct?

17 A I would say so, yes.

18 Q Then later, aluminum came out. And most of the
19 manufactures shifted to aluminum, correct?

20 A Correct.

21 Q And the reason that they shifted to aluminum was
22 because the plastic reflected the heat back into the hard
23 drive but the aluminum kind of dissipated it, kind of like
24 a heatsink, right?

25 A Correct.

1 Q Isn't it true the first aluminum one came out
2 around 2003?

3 A I'm not sure.

4 Q Well, if somebody said the first aluminum one came
5 out in 2003, you would not dispute that, would you?

6 A I would not dispute that.

7 Q Okay. Have you talked with any of the prior
8 owners or salespeople of CompUSA to see when they first got
9 involved in the Metal Gear business?

10 A No.

11 Q Do you know who any of those people are?

12 A No.

13 Q After CompUSA went bankrupt, then their Web site
14 or web name or whatever was bought by Tiger Direct or
15 something, wasn't it?

16 A Correct.

17 Q Do you recall when that was?

18 A In 2008. Could be 2007. I don't know. Maybe.
19 I'm not sure.

20 Q Do you know, talking about the old CompUSA before
21 Tiger Direct bought them, do you know when the old CompUSA
22 last purchased Metal Gear enclosures from datastor?

23 A I don't know.

24 Q Do you know if it was 2006?

25 A I'm not sure.

EXHIBIT C

EXCERPT FROM MERRIAM WEBSTER
WEBSITE



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gear

Entries 1 to 10 of 12. [Next 2](#)

1 gear (noun)

2 gear (verb)

bevel gear

differential gear

On Off

Need Gears Manufactured?

Get quotes on gears jobs. Get gear making work for your shop.
www.mfg.com

Main Entry: **1** gear

Pronunciation: \gɪr\

Function: noun

Etymology: Middle English *gere*, from Old Norse *gervi*, *gorvi*; akin to Old English *gearwe* equipment, clothing, *gearu* ready — more at [YARE](#)

Date: 14th century

1 a : CLOTHING, GARMENTS **b** : movable property : GOODS

2 : EQUIPMENT, PARAPHERNALIA <fishing gear>

3 a : the rigging of a ship or boat **b** : the harness especially of horses

4 *dialect chiefly British* : absurd talk : NONSENSE

5 *dialect chiefly British* : DOINGS

6 a (1) : a mechanism that performs a specific function in a complete machine <steering gear> (2) : a toothed wheel (3) : working relation, position, order, or adjustment <got her career in gear> (4) : a level or pace of functioning <kicked their performance into high gear> **b** : one of two or more adjustments of a transmission (as of a bicycle or motor vehicle) that determine mechanical advantage, relative speed, and direction of travel

— **gear-less** \-ləs\ adjective

[GEAR ILLUSTRATION]

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1 metal (noun)

2 metal (transitive verb)

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Main Entry: **1metal**

Pronunciation: \ˈme-təl\

Function: *noun*

Usage: *often attributive*

Eymology: Middle English, from Anglo-French, from Latin *metallum* mine, metal, from Greek *metallon*

Date: 14th century

1 : any of various opaque, fusible, ductile, and typically lustrous substances that are good conductors of electricity and heat, form cations by loss of electrons, and yield basic oxides and hydroxides ; *especially* : one that is a chemical element as distinguished from an alloy

2 a : **METILE** **1a b** : the substance out of which a person or thing is made

3 : glass in its molten state

4 a : printing type metal **b** : matter set in metal type

5 : **ROAD METAL**

6 : **HEAVY METAL**

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OTHER TRADEMARK REGISTRATIONS

metal gear

Word Mark	METAL GEAR
Goods and Services	IC 009. US 021 023 026 036 038. G & S: enclosures for external computer hard drives. FIRST USE: 20030514. FIRST USE IN COMMERCE: 20030514
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78914975
Filing Date	June 22, 2006
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 22, 2008
Owner	(APPLICANT) Direct Access Technology Inc CORPORATION CALIFORNIA 19957 East Harrison City of Industry CALIFORNIA 91789
Attorney of Record	Michael C. Olson
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "METAL" APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

Typed Drawing

Word Mark METAL SHOP

Goods and Services IC 006. US 002 012 013 014 023 025 050. G & S: metal hardware and fasteners, namely, hinges, brackets, pull handles, corner irons, angle irons, braces, stove bolts, hanger bolts, toggle bolts, machine screws, sheet metal screws, screw eyes, cup hooks, shoulder hooks, washers, picture hangers, cap nuts, screw anchors, sleeve anchors, drive-in anchors, thumb tacks, lag shields, case catches, and gate catches. FIRST USE: 19931013. FIRST USE IN COMMERCE: 19940401

Mark Drawing Code (1) TYPED DRAWING

Serial Number 75180816

Filing Date October 15, 1996

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition September 16, 1997

Registration Number 2119468

Registration Date December 9, 1997

Owner (REGISTRANT) Menard, Inc. CORPORATION WISCONSIN 4777
Menard Drive Eau Claire WISCONSIN 54703

Attorney of Record Robert L. Geske

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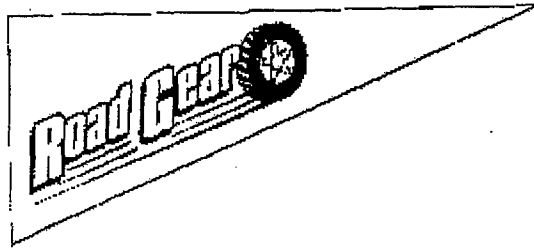
Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20071015.

Renewal 1ST RENEWAL 20071015

Live/Dead Indicator LIVE



Word Mark ROAD GEAR

Goods and Services IC 028. US 022 023 038 050. G & S: playthings, namely, die cast toy vehicles; die cast toy vehicle play sets; large toy vehicles, namely, cars, trucks, flight vehicles, boats, and recreational sports vehicles; battery operated toy vehicles; remote control toy vehicles; radio controlled toy vehicles; toy trains; and model race toy vehicle sets. FIRST USE: 19990915. FIRST USE IN COMMERCE: 19991001

Mark
Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 18.11.01 - Inner tubes; Tire marks; Tires; Tubes, tire
26.05.02 - Plain single line triangles; Triangles, plain single line
26.05.21 - Triangles that are completely or partially shaded
26.17.07 - Heat, lines depicting; Lines depicting speed, propulsion, heat or wind; Propulsion, lines depicting; Speed, lines depicting; Wind, lines depicting

Serial Number 76112675

Filing Date August 18, 2000

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition July 31, 2001

Registration Number 2600295

Registration Date July 30, 2002

Owner (REGISTRANT) SHOPKO STORES, INC. CORPORATION WISCONSIN 700 Pilgrim Way Green Bay WISCONSIN 54304

(LAST LISTED OWNER) SHOPKO STORES OPERATING CO., LLC
CORPORATION DELAWARE 700 PILGRIM WAY GREEN BAY WISCONSIN 54307

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record SUSAN A BUCKNA

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Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

yped Drawing

Word Mark	CLEVER GEAR
Goods and Services	IC 035. US 100 101 102. G & S: Mail order catalog services featuring general merchandise and electronics. FIRST USE: 20000424. FIRST USE IN COMMERCE: 20000424
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	76325611
Filing Date	October 15, 2001
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	April 9, 2002
Registration Number	2588447
Registration Date	July 2, 2002
Owner	(REGISTRANT) Johnson Smith Company CORPORATION FLORIDA 4514 19th St Ct East Bradenton FLORIDA 34203
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GEAR" APART FROM THE MARK AS SHOWN
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR).
Live/Dead Indicator	LIVE



Word Mark	NIGHT GEAR
Goods and Services	IC 009. US 021 023 026 036 038. G & S: Binoculars, Monoculars, Image-Spotting Vision Scopes and Lenses therefor. FIRST USE: 20021007. FIRST USE IN COMMERCE: 20021007
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.01.03 - Star - a single star with five points 26.09.02 - Plain single line squares; Squares, plain single line 26.09.12 - Squares with bars, bands and lines 26.11.21 - Rectangles that are completely or partially shaded 26.11.27 - Oblongs not used as carriers for words, letters or designs
Serial Number	76462022
Filing Date	October 25, 2002
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	December 30, 2003
Registration Number	2824587
Registration Date	March 23, 2004
Owner	(REGISTRANT) ELITE BRANDS INC. CORPORATION NEW YORK 350 FIFTH AVENUE, SUITE 821 NEW YORK NEW YORK 10118
Attorney of Record	RICHARD E. CARMEN
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Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

Typed Drawing

Word Mark MOMMY GEAR

Goods and Services IC 035. US 100 101 102. G & S: retail stores and online retail stores featuring breastfeeding, maternity and baby products, namely, breastfeeding clothing; maternity clothing; baby blankets; infant and toddler clothing; nursing bras; maternity bras; breastpumps; breastfeeding equipment; educational material such as books, magazines and videos relating to pregnancy, breastfeeding and parenting; breast pads; breast milk storage products; baby slings; baby carriers; maternity support pillows; breastfeeding support pillows; infant and toddler feeding products; infant and toddler toys; food, beverage and supplement products for pregnant and breastfeeding mothers. FIRST USE: 19960700. FIRST USE IN COMMERCE: 19960700

Mark Drawing Code (1) TYPED DRAWING

Serial Number 76504080

Filing Date April 4, 2003

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition November 25, 2003

Registration Number 2814822

Registration Date February 17, 2004

Owner (REGISTRANT) Mommy Gear, Ltd. CORPORATION
PENNSYLVANIA 110 Oakview Drive Ligonier PENNSYLVANIA 15658

Attorney of Record Thomas C. Wettach

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Type of Mark SERVICE MARK

Register PRINCIPAL

Live/Dead Indicator LIVE

Typed Drawing

Word Mark HEALTH GEAR

Goods and Services IC 025. US 022 039. G & S: Medical professional and patient clothing; namely jackets, pants, shirts, skirts, tops, bottoms, gowns, dresses, robes, shorts, belts, headwear. FIRST USE: 19920901. FIRST USE IN COMMERCE: 19920901

Mark Drawing Code (1) TYPED DRAWING

Serial Number 78253727

Filing Date May 23, 2003

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition February 10, 2004

Registration Number 2838781

Registration Date May 4, 2004

Owner (REGISTRANT) Health Gear Inc CORPORATION CONNECTICUT
17 Cricket Lane Burlington CONNECTICUT 06013

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Type of Mark TRADEMARK

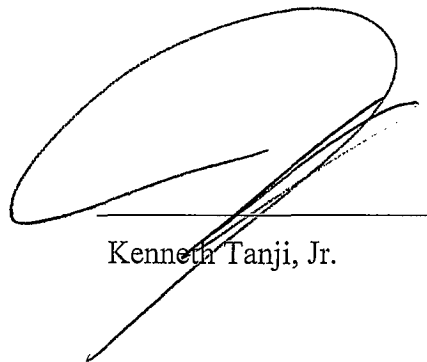
Register PRINCIPAL

Live/Dead Indicator LIVE

CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true copy of the foregoing
OPPOSER'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT; REQUEST
FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IF MOTION FOR REQUEST FOR
DISCOVERY GRANTED; DECLARATION OF KENNETH TANJI, JR. RE:
OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY
JUDGMENT was served by depositing a copy of same in the United States mail, first
class postage prepaid, to the following address on MARCH 30, 2009.

Michael Olson, Esq.
Law Office of Michael C. Olson
1400 Bristol St. N.
Suite 270
Newport Beach, CA 92660



Kenneth Tanji, Jr.